Filed 3/30/05 P. v. Bruton CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS LEE BRUTON,

Defendant and Appellant.

F043420

(Super. Ct. No. 1026382)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Wray Ladine, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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On September 13, 2002, an information was filed in Stanislaus County Superior Court, charging appellant Dennis Lee Bruton with attempted premeditated murder

involving the personal use of a firearm and infliction of great bodily injury (Pen. Code,[1] §§ 187, 664, 12022.53, subd. (b), 12022.7; count I); kidnapping involving the personal use of a firearm and infliction of great bodily injury (§§ 207, subd. (a), 12022.53, subd. (b), 12022.7; count II); carjacking (§ 215; count III); unlawful taking or driving of a vehicle (Veh. Code, § 10851; counts IV, VI); evading a peace officer (Veh. Code, § 2800.2; count V); assault on a peace officer with a semiautomatic firearm involving the use of a firearm (§§ 245, subd. (d)(2), 12022.5, subds. (a) & (d), 12022.53, subd. (b); counts VII, VIII); and exhibiting a firearm in the presence of a peace officer (§ 417, subd. (c); count IX). Appellant pled not guilty and denied the special allegations.

Following a jury trial, appellant was convicted of counts I-VIII, and the special allegations were found to be true.[2] Appellant was subsequently sentenced to a total term of life in prison with the possibility of parole plus 35 years, and ordered to pay victim restitution and a restitution fine. He filed a timely notice of appeal, and now raises various claims of trial and sentencing error. For the reasons which follow, we will affirm.

FACTS

Approximately 1:30 a.m. on July 3, 2001, appellant was stopped for a minor traffic violation several blocks from the vicinity of Bluebird and Rose Avenue in Ceres. He was driving a borrowed vehicle and traveling at a rate of speed noticeably below the speed limit, and had a pair of binoculars on the passenger seat. There was an unlatched briefcase in the back seat. Appellant's appearance differed greatly from his driver's license photograph.

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1 All statutory references are to the Penal Code unless otherwise stated.

2 Count IX was dismissed during trial upon the prosecutor's motion.

Around 3:30 or 4:00 a.m., Amie Denton was walking home on Rose Avenue when appellant, her ex-boyfriend, pulled up and asked if she wanted a ride. As she did not recognize him, she told him no. When he started to get out of the car, she began to run. He had a stun gun and he shocked her with it from behind. It made her lose all bodily functions and fall down. When she tried to get back up, he shocked her again in the neck. She again fell to the ground, and he told her to get into the car. She said no and tried to run, but he shocked her again. All told, he shocked her four times. The last time, he spit in her ear and then stuck the stun gun in her ear.

After the shock to the ear, appellant dragged Denton from the sidewalk into the car, a distance of approximately 15 feet. She managed to get out, but he pulled her back inside and they wrestled around, struggling. Appellant held the stun gun to Denton's neck for at least 20 seconds, but at some point she was able to grab the battery out of the stun gun and throw it somewhere. She tried to climb over appellant to get out of the car through the open driver's door, but he held her down.[3] She scratched him and screamed, trying to get help. Appellant kept telling her to shut up, but she would not be quiet. She honked the horn for a long time, trying to get somebody's attention. Appellant said he was going to kill her.[4]

Appellant tried to get the car started, but Denton kept trying to climb over him. Since the stun gun did not work anymore, appellant said he would get his gun. He leaned over the back of his seat and Denton tried to get over him again, but ended up lying down in the front seat with him on top of her. His knee was on her throat. She could not

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[3] The passenger door was locked. Denton managed to unlock it at one point, but was unable to escape through it.

[4] Denton's screams and the horn honking awakened the Borrells. Mrs. Borrell called 911.

breathe and thought she was going to black out. She believed that if she lost consciousness, she would end up dead.

Appellant said he would just kill her there. Denton said no, what about her baby. Either because of that or because appellant was reaching for the gun, he let up on Denton's throat enough for her to crawl out of the car.[5] She turned to run, but only got as far as the back of the car before he repeatedly struck her over the head with the butt of the gun. He hit her six or seven times, causing her to go to the ground. Each time, she tried to rise, but he struck her again. She believed that if he struck her one more time, she would not be able to make it.

Finally, Denton stood up and nothing hit her, so she began to run. She ran to the residence of Linda McCoy, who lived across the street. As she was banging on the door, appellant drove by and yelled that he would kill her children, wait until she showed up at the funeral, and then kill her. When McCoy opened the door, Denton fell inside. Her hair was matted and bloody. McCoy closed and locked the door, then called 911. Denton told McCoy that appellant had done this to her, and that he had used a stun gun on her. Denton, who was crying and moaning, could not get up. She felt dizzy and tired and like she could not breathe again, and then she started choking on a tooth. She faded in and out of consciousness.

The police and an ambulance arrived soon afterward. Officer Johnson of the Ceres Police Department found a .32-caliber semiautomatic handgun magazine, loaded with seven cartridges, in the roadway, along with two grips from a handgun. There appeared to be hair and blood on the magazine. Johnson also found what appeared to be Denton's watch, hair tie, and shoe.

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[5] Denton saw the gun at some point; it was a handgun with a magazine in the bottom.

As a result of this incident, Denton lost quite a bit of hair, as well as three teeth. She had two black eyes. The stun gun burned holes in her left hand and left marks on her body. She had road burn all over the back of one shoulder from being dragged across the road to the car; the area stayed raw for about a month, then scarred. She had numerous bruises, and one ear was torn half off and had to be stapled back on. Several areas on the top and back of her head had to be stapled in order to close them. She received more than 17 staples. The injuries to her head and ear were caused by appellant hitting her with the gun. She was hospitalized over night, then sent home with a number of medications. When she was released, she was in a lot of pain from a bad headache and her shoulder. The worst of her shoulder pain lasted almost a month, but it still hurt as of the time she testified in March of 2003. !(RT 177-178)!

On July 20, 2001, Alfredo Gomez arrived at a construction job in Ceres in his blue and white pickup. As he was at the back of the pickup, getting his tools, appellant, who was wearing a straw hat, came over and said he needed Gomez's pickup. When Gomez replied that he needed it, too, appellant said he was going to take it. When Gomez turned around, appellant showed him a gun he had at his waist area. Appellant directed Gomez to place his cell phone in the truck, then got into the vehicle and drove off. Gomez notified the police and had his truck returned two days later.

On July 22, 2001, Hughson resident Stan Redding owned a red Chevrolet four-wheel-drive pickup which he had parked in front of his house with a "for sale" sign in the window. A man standing five feet eight or nine inches and weighing around 150 to 170 pounds, with very short hair and wearing a straw hat, asked to see the vehicle.[6] Redding started the truck so the man could hear it run, then stepped out of the vehicle. As he walked around to the passenger side to get in so the man could take it for a test drive, the

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[6] Redding was unable to identify appellant at trial.

man sped off in the vehicle. Redding immediately reported the theft. He subsequently saw his truck on the news and retrieved it out of impound. It now had a flat tire and the rim was bent.

As of July 23, Ceres police officers and members of a multi-jurisdictional auto theft task force were actively looking for appellant. When they located him the next day in Hughson, driving Redding's pickup, a pursuit ensued. Appellant rolled through several stop signs and refused to pull over, although at first his speeds were not excessive for the area. Eventually, however, while he continued to slow for stop signs, his speed increased to 50 to 75 miles per hour or more. He passed slower traffic, causing perhaps 15 to 20 oncoming vehicles to go onto the shoulder of the roadway. He veered around a spike strip that was thrown out in an attempt to disable the vehicle. Once or twice during the pursuit, he reached down toward the area of his feet, as if trying to conceal something or pick something up. In light of prior briefings that appellant was armed with a semiautomatic handgun and possibly a rifle, Ceres Police Detective Collins, one of the pursuing officers, believed he was reaching for a weapon.

Eventually, appellant nearly collided with one of the pursuing vehicles. After covering just over half an hour and approximately 20 miles, the vehicular pursuit ended after the left front tire of the pickup blew out and the truck came to rest in a dirt field south of Modesto.

Appellant ran from the truck in the direction of a nearby park. Collins's partner, Hughson Police Lieutenant Keyes, pulled their vehicle to within 25 to 30 feet of appellant, then noticed appellant had what appeared to be a semiautomatic handgun in his right hand. Keyes and Collins both yelled "gun," and Collins may have broadcast the information on their radio. Keyes slammed on the brakes, and both officers began to exit the vehicle while drawing their own weapons. Appellant stopped, swung around, and pointed his weapon at Keyes and Collins. Fearing for their lives, both officers fired. There was no time to say anything to appellant.

Appellant fell to the ground, seriously wounded.[7] Officers converged on the scene, took appellant into custody, and requested that emergency personnel respond. One of the officers seized a loaded nine-millimeter semiautomatic handgun that was a few feet from appellant's hand. The gun was ready to be fired, with the safety off, the magazine in the weapon, and a round in the chamber. Around his waist, appellant was wearing a fanny pack, as well as a small, clip-on pouch. The pouch contained an empty .25-caliber magazine and a loaded nine-millimeter magazine. A loaded .25-caliber semiautomatic handgun was found in a holster inside the fanny pack.

Stanislaus County Sheriff's Deputy Gilstrap rode to the hospital in the ambulance with appellant. Appellant spontaneously stated that he did not do what "they" said he did. When Gilstrap asked about the stun gun, appellant admitted using it at least five times. He said that after he used the stun gun on his girlfriend, she pulled a pistol on him, but he took it away from her and hit her with it.

Law enforcement authorities interviewed appellant at the hospital on August 8, and then at the jail the next day. Although on medication, appellant was lucid and was informed of and waived his rights. Appellant admitted shaving his head and some facial hair to change his appearance just prior to the July 3 incident because, he claimed, he was being harassed by some motorcycle riders. He said he was looking for Denton to talk to her and get things straightened out, and have her tell the bikers to stop harassing him. Appellant said he stopped her and used a stun gun approximately 10 times in an attempt to get her into the vehicle. He intended to drive her to the home of her children's babysitter so they could talk. Appellant said they struggled, and she reached for a handgun that she knew he carried between the seats. They fought over the gun, and she began honking the horn. He wanted her out of the car because he did not want to draw

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[7] Appellant's wounds resulted in paraplegia.

attention, so he got out and began trying to pull her from the vehicle. At that point, he struck her in the head several times with the gun. She ran from the vehicle. Appellant said that he then went to a quiet spot to think about how badly he screwed up, and he admitted being stupid when he beat her up.

Appellant admitted taking Gomez's truck, and having his hand on a gun at the time, although he did not believe Gomez saw the weapon. Appellant said the gun that he had when he was shot was the same gun he used in the carjacking. He said that when he was stopped by Officer Venn prior to the incident with Denton, there were several guns in the briefcase in the back seat of the car. Appellant also admitted taking Redding's truck. He said he did not surrender when the police first found him because he saw a helicopter in the air, got scared, and proceeded to leave the area.[8] Appellant admitted that he was trying to get away from the police, but also said he did not stop because he wanted to turn himself in to a specific Ceres police officer and he was trying to contact someone he thought could help him obtain bail. During the pursuit, he took the nine-millimeter from his fanny pack and placed it on the seat beside him. Appellant said that at the end of the pursuit, he did not remember getting out of the truck and running, although he did remember having a gun in his hand. He insisted that the safety was on. Appellant said he never saw the officers in the field where the shooting took place, and he did not remember ever consciously pointing the gun at them. He remembered being shot in the chin and going down, at which time he tossed the weapon away. Appellant said he remembered being shot possibly three more times. He denied pointing his weapon at any of the officers or intending to shoot any officers, although he said the gun was still in his hand when he was shot, and he believed the officers felt threatened. Appellant said that he did not surrender when he first got out of the truck because he was

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[8] A Stanislaus County Sheriff's helicopter was involved in the pursuit.

scared, and also because he felt the Ceres Police Department was going to shoot whether he surrendered or not.

DISCUSSION

I

SUFFICIENCY OF THE EVIDENCE

Appellant contends the evidence is insufficient to sustain his convictions for attempted premeditated murder (count I) and kidnapping (count II). The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is "reasonable, credible, and of solid value." (*People v. Johnson*, *supra*, at p. 578.) An appellate court must "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). "Where the circumstances support the trier of fact's finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant's innocence. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

We turn first to appellant's conviction for attempted premeditated murder. "An attempt to commit a crime occurs when the perpetrator, with the specific intent to commit the crime, performs a direct but ineffectual act towards its commission. [Citations.]"

(*People v. Marshall* (1997) 15 Cal.4th 1, 36.) Thus, "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207.) In addition, in the present case, the prosecution was required to prove premeditation and deliberation. (§ 664, subd. (a); see *People v. Seel* (2004) 34 Cal.4th 535, 549.)

Appellant concedes the existence of substantial evidence of intent to kill and, assuming the evidence is sufficient to establish attempted murder, the existence of adequate evidence of premeditation. He claims, however, that his acts did not constitute an attempt to commit murder.

The act required for a finding of attempt "must not be mere preparation but must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances. [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387.) "'Commission of an element of the underlying crime other than formation of intent to do it is not necessary. [Citation.] Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]' [Citation.]" (*People v. Jones* (1999) 75 Cal.App.4th 616, 627, fn. omitted.) "No bright line distinguishes mere preparatory acts from commencement of the criminal design." (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187.)

The evidence adduced at trial is set out at length, *ante*, and we need not repeat it here. We are satisfied that appellant's striking of six or seven brutal blows to Denton's head with a firearm, with sufficient force to split Denton's scalp in multiple places, tear her ear half off, repeatedly knock her to the ground, and break the grips off the weapon, went beyond mere planning, preparation, or intention and constituted an immediate step toward Denton's murder that would have accomplished the crime had appellant not

broken off the attack or had Denton not been able to get away. Accordingly, he is not entitled to a reversal of his conviction on count I.

We turn next to appellant's conviction for kidnapping. Because the evidence failed to establish the requisite asportation, appellant contends, the conviction must be modified to the lesser included offense of attempted kidnapping or felony false imprisonment.

"[K]idnapping … requires a degree of asportation …." (*People v. Reed* (2000) 78 Cal.App.4th 274, 284.) In *People v. Martinez* (1999) 20 Cal.4th 225 (*Martinez*), the California Supreme Court examined the asportation requirement for simple kidnapping (of which appellant was convicted) and aggravated kidnapping (kidnapping for the purpose of robbery or certain sex offenses). It determined that "aggravated kidnapping requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself. [Citations.]" (*Id*. at pp. 232-233.) "In determining 'whether the movement is merely incidental to the [underlying] crime … the jury considers the "scope and nature" of the movement. [Citation.] This includes the actual distance a victim is moved. However, … there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong.' [Citations.]" (*Id*. at p. 233.) A determination of whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in the underlying crime "'includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not … mean that the risk of harm was not increased. [Citations.]' [Citation.]" (*Ibid*.)

The court observed that "[t]he asportation requirement for simple kidnapping has historically been less clear," and that the critical consideration was distance, in that the

victim's movements had to be substantial in character – i.e., more than slight or trivial – to constitute kidnapping under section 207. (*Martinez*, *supra*, 20 Cal.4th at p. 233.) The court examined various cases concerning asportation for simple kidnapping and found that, "[a]lthough purportedly no particular distance was controlling, distance nevertheless became the sole criterion for assessing asportation, with only 'more than slight [citation] or "trivial" [citation]' as guidance in assessing when movement was 'substantial in character.' [Citation.]" (*Id*. at p. 234.)

Recognizing that its own past decisions "provide[d] scant assistance in determining simple kidnapping asportation" (*Martinez*, *supra*, 20 Cal.4th at p. 234), the court overruled the line of cases which limited consideration solely to actual distance. Instead, it determined "that factors other than actual distance are relevant to determining asportation … in all cases involving simple kidnapping.… We therefore reaffirm that for simple kidnapping asportation the movement must be 'substantial in character' [citation], but hold that the trier of fact may consider more than actual distance." (*Id*. at p. 235.) Relevant considerations include the scope and nature of the movement or changed environment, and any increased risk of harm. (*Id*. at p. 236.) The court concluded that in cases involving simple kidnapping, "it would … be proper for the [trial] court to instruct that, in determining whether the movement is '"substantial in character"' [citation], the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhancement opportunity to commit additional crimes. [¶] … [¶] … While the jury may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, as before, the jury need only find that the victim was moved a distance that was 'substantial in

character.' [Citations.] To permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance. At the same time, we emphasize that contextual factors, whether singly or in combination, will not suffice to establish asportation if the movement is only a very short distance." (*Id*. at p. 237, fn. omitted.)

In the present case, the jury was told that one of the elements that had to be proved in order to establish kidnapping was that "the movement of the other person in distance was substantial in character." With regard to this aspect, the jury was instructed: "A movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement including but not limited to the actual distance moved or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes." The parties addressed these factors in argument to the jury.

Acknowledging the Supreme Court's holding in *Martinez*, appellant does not challenge the instruction or the use of factors beyond mere distance in deciding whether there was asportation. Instead, he argues that the contextual factors do not establish asportation since the movement was only a very short distance. He concedes the movement's scope and nature increased the risk of harm to Denton, but says there was no changed environment and points out that the infliction of bodily injury was punished by means of an enhancement to count I.

We are not prepared to say, in light of the totality of the circumstances of this case, that 15 feet is, as a matter of law, too short to constitute movement that is substantial in character. "Where movement changes the victim's environment, it does not have to be great in distance to be substantial. [Citation.]" (*People v. Shadden* (2001) 93

Cal.App.4th 164, 169 [movement found neither incidental to attempted rape nor insubstantial where defendant dragged victim nine feet from open area to closed room]; accord, *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1048-1049 & cases cited therein; see also *People v. Smith* (1995) 33 Cal.App.4th 1586, 1593-1595 [movement of 40-50 feet from driveway open to street view to interior of camper located behind house sufficient to constitute simple kidnapping asportation].)[9] Here, appellant attacked Denton on a public street, then forcibly dragged her into a car, where he escalated his attack on her. In our view, this constituted a changed environment. By moving Denton from an area open to public view to an enclosed, less visible area, appellant decreased the likelihood of detection (for instance, Dennis Borrell could not really tell what was going on inside the car except that there was scuffling); increased the danger inherent in Denton's foreseeable attempts to escape (instead of simply attempting to run, Denton had to climb over appellant, get out of the car, and maneuver around the vehicle); and greatly increased the risk of harm to Denton (for example, the confined area allowed appellant to gain more control over Denton, including placing his knee on her throat until she nearly lost consciousness; in addition, appellant was able to gain access to a firearm). That the actual harm inflicted on her resulted in a sentence enhancement to the attempted murder charge is immaterial.

For the foregoing reasons, we conclude the evidence was sufficient to sustain appellant's conviction for kidnapping, as charged in count II.

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[9] We recognize that *Shadden* and *Aguilar* involve aggravated, not simple, kidnapping. Nevertheless, we find them instructive.

II

CONVICTION OF GREATER AND LESSER OFFENSES

Appellant contends that his conviction for unlawfully driving or taking the Gomez vehicle (Veh. Code, § 10851; count IV) must be reversed because it is a necessarily included offense of carjacking the same vehicle (§ 215; count III). He is incorrect.

It has long been settled in this state that multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson* (1986) 42 Cal.3d 351, 355.) "Generally, two tests are used to determine whether in a particular case a crime is a necessarily and lesser included offense of another crime. The first test looks to the elements of the crime; if, as a matter of legal definition, the greater offense cannot be committed without concomitantly satisfying the elements of the lesser offense, the latter offense is a necessarily lesser included offense. Secondly, a crime is a necessarily lesser included offense if it is within the offense specifically charged in the accusatory pleading. [Citations.]" (*People v. Barrick* (1982) 33 Cal.3d 115, 133.)

"'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) By contrast, the crime of unlawful driving or taking of a vehicle is committed by "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing …." (Veh. Code, § 10851, subd. (a).) Recently, the California Supreme Court applied the so-called elements test of lesser included offenses

and determined that "the crime of unlawfully taking a vehicle is not a lesser included offense of carjacking because a person can commit a carjacking without necessarily committing an unlawful taking of a vehicle." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 (*Montoya*); see *In re Travis W.* (2003) 107 Cal.App.4th 368, 377, fn. 5.)

The *Montoya* court cast strong doubt on using the so-called accusatory pleading test as a means of determining whether multiple convictions are appropriate (*Montoya*, *supra*, 33 Cal.4th at p. 1034), but ultimately did not decide the issue (*id*. at pp. 1035-1036; see *In re Edward G.* (2004) 124 Cal.App.4th 962, 967). While recognizing that lesser included offenses arise under different circumstances, we have squarely held that "only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar." (*People v. Scheidt* (1991) 231 Cal.App.3d 162, 165-166; accord, *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467; see *People v. Pearson, supra,* 42 Cal.3d at pp. 355-356 & fn. 2.) Accordingly, appellant's contention must fail under *Montoya*.

Appellant points out, however, that the trial court here determined, the parties agreed, and the trial court instructed the jury, that the crime charged in count IV was a lesser included offense of the crime charged in count III. !(RT 587, 603, 680, 703-704)! Despite this fact, when the jury returned guilty verdicts on both counts, count IV was not dismissed, but instead the sentence imposed on that count was stayed pursuant to section 654. !(RT 707, 745)! Appellant argues that he is entitled to a reversal of the conviction on count IV, and says respondent should be estopped from arguing to the contrary.

Appellant's claim of estoppel is contained in one sentence, which simply asserts the argument and cites a case (*People v. Diggs* (1980) 112 Cal.App.3d 522, 528, disapproved on other grounds in *People v. Shirley* (1982) 31 Cal.3d 18, 54, fn. 32) that is not on point. "'Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no

discussion.'" (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282; see also *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.) Moreover, we note that, at sentencing, defense counsel took the position that "Count Four … is 654 to Count Three."

In any event, "[t]he doctrine of judicial estoppel essentially acts to prevent a party from abusing the judicial process by advocating one position, and later, if it becomes beneficial to do so, asserting the opposite. The doctrine is designed not to protect any party, but to protect the integrity of the judicial process. [Citation.]" (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1261-1262.) "Although the doctrine … has been recognized in California, our courts have not established a clear set of principles for applying it.… Yet, it has long been settled that '[o]ne to whom two inconsistent courses of action are open and who elects to pursue one of them is afterward precluded from pursuing the other.' [Citation.] Further, it is well established that, for the doctrine to apply, the seemingly conflicting positions 'must be clearly inconsistent so that one necessarily excludes the other.' [Citation.] Moreover, the doctrine 'cannot be invoked where the position first assumed was taken as a result of ignorance or mistake.' [Citation.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181-182, fn. omitted; cf. *New Hampshire v. Maine* (2001) 532 U.S. 742, 750-751.) The doctrine is applied only sparingly, if at all, against the prosecution in criminal actions. (*People v. Watts, supra,* 76 Cal.App.4th at p. 1262.)

Assuming the doctrine can be applied against the prosecution in an appropriate case, this is not that case. *Montoya* has made it clear that the trial court and parties erred in concluding that the offense charged in count IV was necessarily included in the offense charged in count III. Appellant was entitled to have sentence on count IV stayed pursuant to section 654 – which it was – but no more.

III

INSTRUCTIONAL ERROR

The punishment prescribed by section 245 varies according to the instrumentality or amount of force used in the assault and whether the person assaulted was a peace officer or firefighter engaged in the performance of his or her duties. Thus, when the person assaulted is a peace officer or firefighter engaged in the performance of his or her duties, the sentencing range is three, four, or five years where the assault is committed with a deadly weapon or instrument other than a firearm, or by means likely to produce great bodily injury (§ 245, subd. (c)); four, six, or eight years where the assault is committed with a firearm (*id*., subd. (d)(1)); five, seven, or nine years where the assault is committed with a semiautomatic firearm (*id*., subd. (d)(2)); and six, nine, or twelve years where the assault is committed with a machinegun or assault weapon (*id*., subd. (d)(3)).

In the present case, appellant was convicted in counts VII and VIII of assault on a peace officer with a semiautomatic firearm. While CALJIC No. 9.20 (assault with a deadly weapon upon a peace officer, firefighter, et al.) defines "firearm,"[10] and CALJIC No. 9.20.1 (assault with semiautomatic firearm, machinegun, or assault weapon, upon a peace officer, et al.) defines "machinegun" and "assault weapon,"[11] nowhere is "semiautomatic firearm" defined in the standard jury instructions, and the trial court did not define it for the jury here. Appellant contends the trial court had a sua sponte duty to do so because "semiautomatic firearm" is a technical element of the offense, and the

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[10] The jury was instructed in the language of CALJIC No. 9.20 in conjunction with assault with a deadly weapon as a lesser included offense to counts I, VII, and VIII, and was told that "[a] firearm includes a Luger nine millimeter semi-automatic handgun."

[11] The definitions of those firearms were omitted from the instruction given to appellant's jury.

court's omission requires reversal of counts VII and VIII. We conclude there was no error, and even if there was, it was manifestly harmless.

The California Supreme Court summarized a trial court's definitional duty in *People v. Estrada* (1995) 11 Cal.4th 568, 574-575:

> "In a criminal case, a trial court has a duty to instruct the jury on '"""the general principles of law relevant to the issues raised by the evidence."""' [Citation.] The 'general principles of law governing the case' are those principles connected with the evidence and which are necessary for the jury's understanding of the case. [Citations.] As to pertinent matters falling outside the definition of a 'general principle of law governing the case,' it is 'defendant's obligation to request any clarifying or amplifying instruction.' [Citation.]
>
> "… '[T]he language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.' [Citations.]
>
> "The rule to be applied in determining whether the meaning of a statute is adequately conveyed by its express terms is well established. When a word or phrase '"is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request."' [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citation.] Thus, …, terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance. [Citation.]"

Myriad cases address whether certain terms and phrases must be defined, sua sponte, for the jury. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 1015, 1023 ["force," as used in rape statute, not intended to be given specialized legal definition, so no sua sponte obligation to instruct on definition of term]; *People v. Navarette* (2003) 30 Cal.4th 458, 502-503 ["immediate presence," for purpose of elements of robbery, sufficiently

clear in context of particular case so that no further clarification necessary]; *People v. Roberge* (2003) 29 Cal.4th 979, 988-989 [sua sponte duty to define "likely," in sexually violent predator trial, because meaning in that context neither plain nor unambiguous]; *People v. Estrada, supra,* 11 Cal.4th at p. 578 [no sua sponte duty to define "reckless indifference to human life," as used in § 190.2, subd. (d), as phrase has no technical meaning peculiar to law]; *People v. Rowland* (1992) 4 Cal.4th 238, 270-271 ["while engaged in" need not be defined for purpose of felony-murder special circumstance as phrase is commonly understood and not used in technical sense]; *People v. Williams* (1988) 45 Cal.3d 1268, 1314-1315 [where "conspiracy" is used in common and nontechnical sense, no definition is required]; *People v. Anderson* (1966) 64 Cal.2d 633, 639 ["force and fear" for robbery have no technical meaning peculiar to law and are presumed to be within jurors' understanding]; *People v. Chavez* (1951) 37 Cal.2d 656, 668 ["perpetrate" has no technical meaning peculiar to law, so no definition required]; *People v. Nicholson* (2004) 123 Cal.App.4th 823, 833 ["prisoner" must be defined in constructive incarceration case because, in that context, term could be misleading]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014-1015 [trial court had no sua sponte duty to define "sustained," for purposes of § 422, until jury requested further clarification of term]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465-466 ["prevented from resisting" must be defined because, in context of rape by intoxication, term is not clear and unambiguous]; *People v. Mobley* (1999) 72 Cal.App.4th 761, 782-783 ["developmental disability," for purposes of capacity to give legal consent to sexual act, need not be defined because no technical legal or medical diagnosis of such disability is necessary for conviction]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1338-1339 ["speeding" must be amplified or clarified sua sponte because, in context of basic speed law, term is not clear and definite]; *People v. Pruett* (1997) 57 Cal.App.4th 77, 81-82, 85-86 [whether "deadly weapon" has technical meaning which must be defined depends on context in which term is used]; *People v. Forbes* (1996) 42 Cal.App.4th 599, 605

["stranger" has no technical meaning in context of § 1203.066 allegation, hence jury need not be instructed on its definition]; *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360-1362 [no sua sponte definition of "willful" and "wanton" required for purposes of Veh. Code, §§ 2800.1 and 2800.2, where neither embraces technical legal meaning]; *People v. Shoals* (1992) 8 Cal.App.4th 475, 489-490 ["opening" and "maintaining" a place for unlawful sale, etc., of controlled substances for purposes of Health & Saf. Code, § 11366 has technical meaning and so must be defined]; *People v. Cantrell* (1992) 7 Cal.App.4th 523, 534-535 [in context of § 311.4, "rectal area" is not a technical term requiring special instruction]; *People v. Smith* (1987) 188 Cal.App.3d 1495, 1513-1514, overruled on other grounds in *People v. Davis* (1994) 7 Cal.4th 797, 804-805,810 ["viable" has specialized meaning in context of fetal murder, hence definition is required]; *People v. Stewart* (1979) 89 Cal.App.3d 992, 999 ["amenable to treatment" requires no definition in mentally disordered sex offender proceeding].) All look to the context in which the term is employed; a trial court's sua sponte obligation to define or clarify the term "comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a "particular and restricted meaning' [citation], or has a technical meaning peculiar to the law or an area of law [citation]." (*People v. Roberge, supra,* 29 Cal.4th at p. 988.)

In our view, the term "semiautomatic firearm" is one of common parlance. Although the Legislature saw fit expressly and specifically to define the terms "machinegun" (§ 12200) and "assault weapon" (§§ 12276, 12276.1), we can find no such definition for the term "semiautomatic firearm" as used in section 245. This supports a conclusion that no specialized legal meaning was intended for that term. (See *People v. Griffin, supra,* 33 Cal.4th at p. 1023.)

Webster's Third New International Dictionary (1986) page 2063 defines "semiautomatic" as "not fully automatic: as **a**: operated partly automatically and partly by hand … **b** *of a firearm*: that employs gas pressure or force of recoil and mechanical spring action in ejecting the empty cartridge case after the first shot and in loading the

next cartridge from the magazine but that requires release and another pressure of the trigger for firing each successive shot ...." Appellant points to this latter definition as evidence that "semiautomatic firearm" has a technical meaning which the trial court erred by failing to define. In our view, however, the latter definition merely elaborates on the general definition by explaining *how* a firearm is "operated partly automatically and partly by hand." As a semiautomatic firearm is one which operates partly automatically and partly by hand, its statutory definition does not differ from the meaning that might be ascribed to the same term in common parlance; hence, the trial court was under no sua sponte obligation to define or clarify the term. (*People v. Estrada, supra,* 11 Cal.4th at pp. 574-575.) In the context of this case, the jury did not need to know the technical "ins and outs" of how a semiautomatic firearm works.[12]

Moreover, there was never any dispute in the present case concerning whether the weapon in question was a semiautomatic firearm. The contested issue with respect to counts VII and VIII was not the type of firearm involved, but the existence of an assault.[13] Accordingly, even assuming the trial court should have defined the term

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[12] We express no opinion concerning whether a trial court might, in some other circumstances, be obligated to define or clarify the term.

[13] Appellant points to Detective Collins's assertedly crucial testimony that "a gun is a gun," and takes issue with the officer's statement that the number of rounds the weapon can hold is the only difference between a semiautomatic firearm and a revolver. Read in context, however, the testimony does not purport to describe differences in the weapons for purposes of determining the applicable subdivision of section 245:

"Q [by the prosecutor] Did you have information that [appellant] was armed with specific type of a weapon?

"A Rifle and a semi-automatic handgun.

"Q Is there a difference on how you would respond to a situation based on the type of weapon that you're aware somebody may be carrying?

"A Yes. [Fn. contd.]

"semiautomatic firearm," any error was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 502-505; see also *People v. Nicholson, supra,* 123 Cal.App.4th at p. 834; *People v. Jimenez* (1995) 33 Cal.App.4th 54, 62.)

IV

IMPOSITION OF UPPER AND CONSECUTIVE TERMS

At sentencing, the trial court heard extensive argument concerning factors in aggravation and mitigation. Ultimately, the court stated: "I've considered circumstances in aggravation that the crime involved great violence, great bodily harm, high degree of cruelty, viciousness and callousness, within the meaning of California Rules of Court Rule 4.421(a)(1),[14] also, that the defendant was on probation when the crime was committed within the meaning of Rule 4.421(b)(4), also, the manner in which the crime was carried out indicates planning, sophistication and professionalism within the meaning of Rule 4.421(a)(8). [¶] Further, the defendant engaged in violent conduct which indicates that he is a serious danger to society within the meaning of Rule 4.421, Subdivision B, Subdivision 1. [¶] I've also considered circumstances in mitigation, …, that the defendant's criminal record is insignificant within the meaning of Rule 4.423(b)(1). [¶] Further, although it is not a specified rule in the Rules of Court regarding mitigation, I am considering that even though the law enforcement officers

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"Q Tell us about that.

"A Well, if I'm responding to an area where they don't have any weapons, then I'm not so concerned. If there's a handgun or any type of gun that's involved, my awareness is heightened extremely because the gun is going to kill me.

"Q And what about semi-automatic handguns?

"A You know, a gun is a gun as far as I'm concerned, if it shoots out a projectile and it can kill me, you know. It just so happens that a semi-automatic can hold more rounds than a revolver can, but that would be the only difference."

14 All references to rules are to the California Rules of Court.

were justified, certainly, in shooting Mr. Bruton, I will consider the fact that he was shot and is now a paraplegic as a circumstance in mitigation. [¶] However, Mr. Bruton, by your actions as proven at trial, it shows that you are an extreme danger to society.…"

The court then proceeded to sentence appellant to life in prison with the possibility of parole on count I, plus a consecutive 10-year enhancement pursuant to section 12022.53, subdivision (b) and a consecutive 3-year enhancement pursuant to section 12022.7. With respect to the remaining counts, for which determinate sentences were required, the court selected count VII as the principal term and imposed the upper nine-year term thereon "because the circumstances in aggravation outweigh the circumstances in mitigation. There were multiple victims of the assault, the defendant was carrying a small arsenal of weapons, they greatly endangered the officers and the public, and it showed planning and sophistication to escape and avoid arrest." The court further imposed a consecutive 10-year enhancement pursuant to section 12022.53, subdivision (b). The court imposed sentences of one-third of the middle term on counts III, V, and VI (one year eight months, eight months, and eight months, respectively), and ordered the terms to run consecutively because the offenses were separate and distinct, and predominantly independent of the other offenses. The court further ordered the determinate sentences to run consecutively to the determinate term imposed in count I for the same reasons. The court imposed the upper term and consecutive enhancement on count VIII for the same reasons as count VII, but ordered that the sentence run concurrently to that imposed in count VII. Pursuant to section 654, it stayed the sentences imposed on counts II (18 years) and IV (2 years). Accordingly, appellant was

sentenced to a total determinate term of 35 years, consecutive to an indeterminate life term.[15]

Appellant now contends the trial court violated his Sixth Amendment right to trial by jury and Fifth and Fourteenth Amendment right to due process of law by imposing upper and consecutive terms based on factors not admitted by appellant or found to be true by the jury beyond a reasonable doubt. This contention is based on the recent United States Supreme Court case of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

As a preliminary matter, we address respondent's claim that appellant waived his right to challenge his sentence under *Blakely*. Noting that the defendant in *Blakely* objected when the court imposed a sentence beyond the statutory maximum (*Blakely*, *supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2535]), respondent argues that appellant's failure to object to the imposition of the upper term on constitutional grounds, or to demand a jury determination of sentencing factors, forfeited his right to assert such a claim or challenge now. (Cf. *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061 [defendant waives right to object on *Apprendi* grounds by failing specifically to object on that ground below].)

We disagree. *Blakely* was not decided until after appellant was sentenced. As of that time, there was no reported decision holding that an upper term sentence violated the Sixth Amendment if premised on factors found by the trial court rather than a jury. California courts and numerous federal courts held there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (See, e.g., *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231.) The case extended the

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15 The parties erroneously describe appellant's sentence as being 35 years to life. It is not: it is life plus 35 years, a subtle difference, but a difference nonetheless.

Apprendi rationale into a new area; there can be no forfeiture or waiver of a legal argument not recognized at the time of trial and sentencing. (See *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2.)

We turn now to appellant's challenge to the trial court's imposition of the upper term. In our view, the holdings in *Blakely* and *Apprendi* do not apply when the exercise of judicial discretion is kept within a sentencing range authorized by statute for the specific crime of which the defendant is convicted by a jury. Based on constitutional history, *Apprendi* advises, "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing judgment *within the range* prescribed by statute." (*Apprendi*, *supra*, 530 U.S. at p. 481.) *Apprendi* instructs further that a "sentencing factor" is distinguishable from a "sentence enhancement": the former is a "circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense"; the latter is "used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id*. at p. 494, fn. 19.)

In *Blakely*, while the sentence was within the indeterminate maximum for the category of the offense (class B felony), the sentenced term exceeded the specific range set by Washington state statute for the offense; the trial court's excessive term was based on facts not found by the jury and thus constitutionally excessive. (*Blakely*, *supra*, 542 U.S. at pp. ___ [124 S.Ct. at pp. 2539-2540].)

Given this backdrop, we find California's determinate sentencing law constitutional and appellant's present sentence constitutionally permitted. Under this state's determinate sentencing law, each applicable specific offense is given a sentencing range that includes lower, middle, and upper terms. A defendant's right to a jury trial for

that offense is with the understanding that the upper term is the maximum incarceration he or she may be required to serve if convicted of the specific offense for which he or she faces trial. Should the People allege enhancement charges, those are separately charged and the defendant is entitled to a jury's determination of the truth of such charges.

The determination of the court's choice of term within the particular range allowed for a specific offense is made after an evaluation of factors in mitigation and aggravation. These sentencing factors, consistent with the definition found in *Apprendi*, are weighed by the sentencing judge in determining the term of punishment within the specific offense's sentencing range. If there are no such factors or neither the aggravating nor mitigating factors preponderate, the court shall choose the middle term; additionally, the court retains the discretion to impose either the upper or middle term where it finds the upper term is justifiable. (*People v. Thornton* (1985) 167 Cal.App.3d 72, 77.) Such an exercise of discretion does not violate the constitutional principles set forth in *Apprendi* and followed in *Blakely* because the court's discretion is exercised within the specific statutory range of sentence.[16]

Here, the trial court selected the upper term based upon its analysis of sentencing factors set out, *ante*. This choice of term was within the statutory range allowed for the specific offenses of which appellant was convicted. No constitutional violation occurred.

With respect to the trial court's imposition of consecutive terms on various counts, we note that the imposition of consecutive sentences was not at issue in *Blakely*, and

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16 Our conclusion finds support in the recent amplification of *Apprendi* and *Blakely* found in *United States v. Booker* (2005) 543 U.S. ___ [125 S.Ct. 738]. We distill from that opinion the following refinement for our present purposes: If a fact *necessarily* results in a higher sentence, the fact must be admitted by the defendant or found by the jury. Because California's sentencing law vests in the trial court discretion to choose the middle term even where aggravating factors are found which preponderate, the present sentence is constitutionally permitted.

viewed in context there is no indication *Blakely* was intended to apply in that circumstance. *Blakely* (and *Apprendi*) were concerned with the finding of a fact "'that increases the penalty for *a* crime beyond the prescribed statutory maximum.'" (*Blakely*, *supra*, 532 U.S. at p. ___ [124 S.Ct. at p. 2536], italics added; *Apprendi*, *supra*, 530 U.S. at p. 490.) Relatedly, *Apprendi* advised that the relevant issue was the sentence for a particular crime, not the aggregate effect of the defendant's multiple sentences. (*Id*. at p. 474.) As to each of appellant's convictions, a jury found him guilty beyond a reasonable doubt, and he received no more than the statutory maximum for each conviction. Imposing those lawful sentences consecutively does not exceed the statutory maximum penalty for any one of his offenses.

In addition, there is no presumption of concurrent sentencing in California, in the sense that a concurrent term could possibly be construed to be a type of statutory maximum for *Blakely* purposes. When a defendant is convicted of multiple crimes, the trial court has discretion to impose sentence on the subordinate counts consecutively or concurrently. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000.) We recognize that a sentence in section 669 reads: "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." This language, however, merely mandates concurrent terms if the court has *failed to indicate* whether a sentence is to be consecutive or concurrent. It does not create a presumption favoring concurrent terms. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

We agree that judicial fact-finding does occur in connection with a trial court's exercise of discretion in choosing whether to impose concurrent or consecutive terms.[17]

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17 Section 1170, subdivision (c) requires the trial court to "state the reasons for its sentence choice on the record …." It would appear that this requirement merely creates a record to facilitate appellate review of the sentencing choice for an abuse of discretion,

Nonetheless, unlike the excessive sentence in *Blakely*, the imposition of consecutive sentences does not represent a penalty in excess of a statutory maximum, necessarily based on a fact neither found by the jury nor admitted by the defendant.

DISPOSITION

The judgment is affirmed.

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Ardaiz, P.J.

WE CONCUR:

_____
Dibiaso, J.

_____
Levy, J.

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but does not require a finding of additional facts. On the other hand, rule 4.425 sets forth nonexclusive "[c]riteria affecting the decision to impose consecutive rather than concurrent sentence." Some of these criteria involve the same sort of fact-finding that takes place in the determination whether to impose the upper term based on non-prior-conviction-related factors.